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Supreme Court, U.S.
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DEC 20 1985
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No. 85-666

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found, in the circumstances of this case, that a newspaper company was the statutory employer of the employees who worked in its mailroom and delivery operation and that the company had an obligation to recognize and bargain with the representative of those employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 766 F.2d 812. The decision and order of the National Labor Relations Board (Pet. App. 23a-192a) are reported at 271 N.L.R.B. 201.

JURISDICTION

The judgment of the court of appeals (Pet. App. 193a-194a) was entered on August 6, 1985. A peti-

tion for rehearing was denied on September 3, 1985 (Pet. App. 195a-196a). The petition for a writ of certiorari was filed on October 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. a. Since 1965, The News Printing Company, Inc. (The News),[1] a daily newspaper in Paterson, New Jersey, has arranged for its mailroom and delivery operation to be handled by the T&T News Company, Inc. (T&T). Before T&T performed these functions, The News had a similar arrangement with the Silk City Distributing Co., Inc. (Silk City). The mailroom and delivery employees— who were responsible for preparing the newspapers for delivery from The News' mailroom, loading the papers onto delivery trucks, and driving the trucks to deliver the papers to retail customers and distribution drop points—have been represented by the Newspaper & Mail Deliveries Union of New York & Vicinity (NMDU) since 1964, when the union was certified by the National Labor Relations Board (NLRB or Board). Pet. App. 5a, 26a-27a, 80a-86a; Pet. 3.

T&T was formed in 1965 at The News' request by two of Silk City's former employees, Peter and Louis Trombina, at little or no capital investment by them. The Trombinas agreed that T&T would work exclusively for The News and would employ the same mailroom and delivery employees who had been working for Silk City and who were represented by

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[1] Petitioners Allbritton Communications Company, The News Printing Company, Inc., and The Hudson Dispatch were found to be a single enterprise for the purpose of this case (Pet. App. 4a, 25a), a finding which is not disputed here. References herein to "The News" include the other petitioners as well.

the NMDU. The News has provided the Trombinas with free office space, equipment, and telephone service necessary to run their business. Pet. App. 13a, 26a, 80a-81a.

Under the terms of the agreement between The News and T&T,[2] the mailroom employees and drivers handled the newspapers using The News' material and equipment, and delivered the papers in trucks provided by The News and bearing The News' logo. While T&T had responsibility for hiring, the News established the number of employees T&T was to have working on each shift, and retained the right to require T&T to hire additional employees and to demand that T&T discharge any driver, supervisor, or assistant foreman who did not meet The News' approval. Similarly, while T&T directly supervised the employees, The News established the work schedules to be maintained by T&T as well as the routes and schedules to be followed by the T&T drivers, who delivered the newspapers to customers procured by The News. T&T was responsible for maintaining its own bookkeeping and payroll. The News, however, paid T&T a weekly amount sufficient to cover employee salaries and fringe benefits as required by the T&T-NMDU collective bargaining agreement, and agreed to increase its payment whenever salaries and benefits were increased under the collective bargaining agreement. The News also paid for all operating expenses incurred by T&T, including expenses for operating and maintaining the delivery trucks, legal fees, accounting and bookkeeping costs, and a

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[2] T&T and The News first entered into an agreement in 1966. When Allbritton purchased The News in 1977, it assumed the terms of the existing agreement which ran from 1976 to 1982. Pet. App. 5a, 26a, 84a.

guaranteed profit for the Trombinas. Pet. App. 13a (and citations to C.A. App. therein), 26a-27a, 84a-86a.

Peter Trombina negotiated the collective bargaining agreements between T&T and the NMDU. Trombina, however, secured The News' approval of the terms of agreement before signing any contract. Thus, during contract negotiations in 1979, Trombina discussed the NMDU's demands with The News' representatives, including New President Dean Singleton; he then presented The News' position to the NMDU, and secured Singleton's approval before signing the collective bargaining agreement. That agreement contained a grievance-arbitration provision binding on T&T, but grievances concerning the condition of the delivery trucks or the mailroom were routinely presented to The News for resolution. Pet. App. 5a, 13a, 27a-28a, 86a-88a.

b. Trombina also periodically acted as The News' conduit in seeking the NMDU's approval for changes which The News wished to make in its mailroom and delivery operation. In the instant controversy, for example, The News and T&T entered into an agreement in which Trombina was to seek the NMDU's approval of The News' proposal to consolidate delivery routes and reduce the size of T&T's workforce. The News agreed to pay for legal costs, including arbitration expenses, incurred by T&T, and to make any severance payments required by the T&T-NMDU contract for any employee laid off as a result of the reduction-in-force. The News also agreed that T&T's profits would not be reduced in any way. Pet. App. 13a, 31a, 86a-90a.

Trombina was unable to convince the NMDU to agree to The News' proposal to reduce the size of the

mailroom workforce, and was then also unsuccessful in his attempt to secure the reduction-in-force in an arbitration proceeding. The News' President Singleton was not happy with the arbitration result and expressed his intention to get rid of the unionized mailroom employees. Pet. App. 5a, 31a, 90a-93a.

On January 14, 1981, The News notified Trombina that he could no longer maintain the T&T corporate office in The News' building, and that T&T must vacate the facility by January 26,. On February 9, The News, without notice to either Trombina or the NMDU, brought in approximately 25 "stranger" employees to remove newspapers from the conveyor belt and insert advertising supplements into each paper. Trombina and NMDU officials protested that the "strangers" were performing union work. The News subsequently ordered Trombina and the employees out of the building. Thereafter, while the mailroom employees established a picket line outside of The News' facility, "strangers," including recently-hired security guards, completed the mailroom operation and drove the trucks along the delivery routes, as The News had already trained them to do. The News subsequently hired a new crew of mailroom employees and drivers. Pet. App. 5a, 31a, 92a-95a.

2. Upon charges filed by the NMDU, the Board found that The News violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (3), and (5), by locking out and replacing the mailroom employees and drivers because of their affiliation with the NMDU, by changing the mailroom and delivery operation without notification and bargaining with the NMDU, and by refusing to recognize and bargain with the NMDU

as the exclusive representative of the mailroom employees and drivers (Pet. App. 31a, 46a).[3] The Board ordered The News, inter alia, to offer reinstatement with backpay to the mailroom employees and drivers, and to recognize and bargain, upon request, with the NMDU (*id.* at 51a-52a).

The Board rejected The News' contention that it bore no liability for the conduct found to be unlawful because the mailroom employees and drivers were the employees of T&T and were not employees of The News within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). The Board found instead that T&T, "in performing the role of employer to the mailroom employees/drivers," was not an independent contractor but rather was "little more than an administrative arm of [The News]," and that "the Trombinas were managers employed by [The News] to operate the delivery system to [The News'] specifications" (Pet. App. 29a).[4] Applying the " 'right to

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[3] The Board also found that The News committed certain unfair labor practices, and dismissed allegations of other unfair labor practices, in regard to its composing room and editorial employees, who were represented by a different union (Pet. App. 46a-48a). The Board's order respecting these matters was upheld against a union challenge by the court of appeals (*id.* at 16a-22a), but no issue regarding these findings is involved here.

[4] The administrative law judge found that The News and T&T were joint employers of the mailroom and delivery employees, but also concluded that he was collaterally estopped from deciding the joint employer issue by a federal district court ruling in a case involving The News and the NMDU (Pet. App. 96a-108a). The Board rejected the collateral estoppel finding, noting, inter alia, that "the district court later determined that it improperly asserted removal jurisdiction" (*id.* at 28a n.4). The court of appeals upheld the Board's re-

control' test" (*ibid.*) the Board explained (*id.* at 30a):

> The relationship between [The News] and T&T exhibited strongly most of the factors commonly associated with agency or employee status. T&T performed functions which were an essential part of the newspaper's operation, had a long-term exclusive working arrangement with the newspaper, carried the newspaper's product in trucks bearing the newspaper's name, conducted its operation under daily guidance from newspaper personnel and subject to unilateral changes dictated by the newspaper, had no proprietary interest in the work or the premises and equipment used to perform it, and had no opportunity to take entrepreneurial risks. See *News-Journal Co.* v. *NLRB*, 447 F.2d 65 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972). Weighed against these factors and [The News'] direct and indirect participation in labor relations matters, T&T's conduct of the lower level functions of employee management and dealing with the Union was more akin to the role performed by supervisors than that characteristic of independent contractors. *Better Building Supply Corp.*, 259 NLRB 469 (1981), enfd. mem. 707 F.2d 518 (9th Cir. 1983).

3. The court of appeals upheld the Board's decision and enforced its order. The court concluded that the Board had properly applied the "right to control" test in determining that T&T was not an

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jection of the collateral estoppel finding (*id.* at 14a-15a), and no issue concerning that ruling is raised here. The Board also rejected the joint employer finding, noting that such a finding was incompatible with its finding that T&T was not an independent contractor (*id.* at 29a).

independent contractor and that the mailroom and delivery personnel were employees of The News (Pet. App. 10a-13a). The court rejected The News' contention that the Board had failed to apply the principles established in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), by equating a finding of agency status of T&T with a finding that The News employed the T&T personnel. The court explained that the Board did not find a mere agency relationship between The News and T&T, but rather a master-servant relationship; "[v]iewed as such, the mailroom employees were subservants of T&T which in turn was a servant of [The News], thereby rendering [The News] the statutory employer of the NMDU workers" (Pet. App. 12a (citation omitted)).

The court of appeals also rejected The News' contention that the imposition of liability and a duty to bargain was a denial of due process because The News had never been certified by the Board as the employer of the mailroom and delivery employees. The court stated (Pet. App. 15a-16a):

> When Allbritton purchased The News in 1977, The News asserted effective control over T&T and the mailroom employees, acting as their employer for purposes of the National Labor Relations Act. The News cannot now be heard to complain that the concomitant burden accompanying this employer-employee relationship—the duty to negotiate and abide by the terms of the existing collective bargaining agreement—violates due process.

ARGUMENT

The News does not dispute that, if it was the statutory employer, its actions were illegal (Pet. App. 10a). The issue in this litigation, then, is whether the Board was correct in determining that petitioners were the statutory employers. The petition for certiorari attempts to paint the employer determination issue as involving a question of appropriate legal tests and due process. In fact, however, the case hinges simply on the facts found by the Board to support its determination; there is really no controversy over the appropriate legal standard. Since the court of appeals' decision in this fact-bound case does not conflict with the decisions of this Court or any other court of appeals, and since the appropriate legal tests to be applied have already been set out by this Court and are not in dispute, no further review is warranted.

1. Petitioners contend (Pet. 12-14) that they bear no liability for their conduct found to be unlawful by the Board—unilaterally changing the working conditions of the mailroom employees and drivers, locking out and replacing those employees with nonunion personnel, and refusing to bargain with the NMDU—because the affected individuals were the employees of T&T and not statutory employees of The News. Essentially, petitioners contend that the Board improperly failed to apply the common law test for the master-servant relationship as set forth in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), in determining the relationship between The News, T&T, and the mailroom and delivery employees. There is no merit to this contention.

In *Kelley*, this Court addressed the question whether an employee of a trucking company that

worked on contract for a railroad could be considered an employee of the railroad for purposes of coverage under the Federal Employers' Liability Act, ch. 149, 35 Stat. 65-66, 45 U.S.C. 51-60. The Court held that one way of establishing the three-party employment relationship would be to show that the employee was a "subservant of a company that was in turn a servant of the railroad." 419 U.S. at 324 (citations omitted). This showing would require more than proof of a traditional principal-agent relationship in which the railroad was "responsible" for the actions of its contractor. *Id.* at 325. The Court stated that it would be necessary to establish that the trucking company stood in a master-servant relationship with the railroad in which the railroad 'controlled or had the right to control the physical conduct of the [trucking company's] employees." *Ibid.*[5]

The Board's decision in this case is, therefore, fully consistent with *Kelley*. The court of appeals noted (Pet. App. 12a) that the Board did more than "find that [The News] bore mere 'responsibility' for the mailroom operations." Rather, the Board explicitly applied the "right to control" test described in *Kelley* (*id.* at 12a, 29a). It found that T&T func-

[5] The Court said that Section 220(2) of the Restatement (Second) of Agency (1958) could be "instructive" in the right to control inquiry. 419 U.S. at 324. Section 220(1) of the Restatement defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying that definition, such as: control over the details of the work, whether the one employed is engaged in a distinct line of work, skill required for the work, provision of tools and workplace, and length of time of relationship. Compare Pet. 15 n.6.

tioned as an "administrative arm" of The News, and that "the Trombinas were managers employed by [The News] to operate the delivery system to [The News'] specifications" (*id.* at 29a); as the court of appeals said (*id.* at 12a), "[t]he mailroom employers were subservants of T&T which in turn was a servant of [The News], thereby rendering [The News] the statutory employer of the NMDU workers." In short, the Board found that T&T lacked the entrepreneurial attributes and burden of risk normally associated with an independent business enterprise, and that The News controlled not only the result to be achieved—the delivery of its newspaper —but also the means and method by which the T&T employees performed the mailroom and delivery service.

Accordingly, the only issue actually raised by petitioners' contention is whether the record evidence supports the Board's finding, upheld by the court of appeals, that The News controlled or had the right to control T&T's operation to the degree necessary to be liable as the employer of the mailroom and delivery employees. This contention simply raises a question of the application of facts to settled principles of law not in dispute, and does not warrant review by this Court. The evidence set out by the Board (Pet. App. 26a-31a, 80a-96a) and the court of appeals (*id.* at 13a) amply supports the Board's finding.[6]

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[6] The petition (at 13) concedes that the court of appeals "gave the appearance of following *Kelley*." Thus, even if it were true—and it is not—that the court was in reality following some other test, there would be no need for this court to reaffirm *Kelley*'s validity. Similarly, the petition would apparently require that the Board quote full passages from

2. Nor is there merit to petitioners' contention (Pet. 8-12) that the Board may not, consistent with due process, find The News to be the employer of the mailroom employees and drivers because it was not a party to the Board proceeding in 1964 in which the NMDU was certified as the bargaining representative of those employees and in which the predecessor of T&T—Silk City—was identified as the employer. The obligation to bargain with the representative of a unit of employees depends upon the actual relationship, at any given time, between the employees and the business entity actually functioning as the employer. The Board may properly look beyond the cosmetic appearance of corporate structure to identify the true parties to a relationship.[7] What-

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Kelley in any decision or run the risk of having the standard used attacked. This is unnecessary; the Board said it was applying the (*Kelley*) "right to control" test, and that is enough.

The petition (at 14-16) also asserts that while the court of appeals may have applied the correct test, *it* should not have done so in light of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). What the court was demonstrating in listing the underlying indicia of The News' right to control, however, was that the Board's finding was, besides being consistent with *Kelley*, also supported by "substantial evidence" (Pet. App. 12a; see also *id.* at 16a-17a, 19a-20a)). In any event, since the Board applied the proper test, *Chenery* is inapposite.

Finally, as we said in our brief to the court of appeals (at 41-42), the petitioners failed to object to the Board regarding its finding that T&T was not an independent contractor and that, therefore, petitioners were the statutory employer. As a result, their challenge now to this finding is barred by 29 U.S.C. 160(e). *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

[7] See, *e.g.*, *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) (successor employer); *NLRB* v.

ever the corporate interrelationships may have been in 1964, when Silk City was named in the Board certification as the employer of the mailroom and delivery employees, the fact remains that The News asserted effective control over those employees, and T&T, the nominal employer, functioned merely as its servant. Moreover, as discussed (page 4, *supra*), The News had knowledge of and became fully involved in the bargaining negotiations between T&T and the representative of those employees. Under these facts, it was not a denial of due process for the Board to impose on The News the obligation to recognize and bargain with the NMDU.[8]

Al Bryant, Inc., 711 F.2d 543 (3d Cir. 1983), cert. denied, 464 U.S. 1039 (1984) (single employer and alter ego); *Sun-Maid Growers of California* v. *NLRB*, 618 F.2d 56 (9th Cir. 1980) (joint employer). These cases also suggest the fact-bound nature of such inquiries.

[8] There is also no merit to petitioners' suggestion (Pet. 9-12) that the NMDU waived its right to bargain with The News. The NMDU letter of May 5, 1980 (Pet. App. 205a-206a), upon which petitioners heavily rely, was written in response to a letter from The News (C.A. App. 1490) (requesting that union representatives meet with The News to talk about the company's financial situation, but denying that The News had a contractual relationship with the union). The NMDU's response, stating that under the circumstances the union could not "go behind" T&T and meet with The News, could be construed as merely taking The News at its word. Nor was the NMDU necessarily on notice at that time of all of the evidence that subsequently came out in the unfair labor practice proceeding regarding the relationship between The News and T&T. There is, in any event, no reason to hold the NMDU, let alone the Board, to be estopped by a single union letter from asserting a relationship that a great deal of other evidence in this case establishes. Petitioner puts more weight on one letter, written in an ambiguous context, than it will bear.

The circumstances here are far different from those in *Alaska Roughnecks & Drillers Ass'n* v. *NLRB*, 555 F.2d 732 (9th Cir. 1977), cert. denied, 434 U.S. 1069 (1978), which petitioners assert is a conflicting decision.[9] There, a few months after the certification proceeding, the union sought to establish a bargaining relationship with an employer that had not been included in that proceeding. The court concluded that the appropriate time to determine that employer's relationship to the unit employees was the recently concluded certification proceeding and not a subsequent unfair labor practice proceeding. *Id.* at 736. Here, by contrast, the certification proceeding was long ago and remote from the record, and the relationship between the "new" employer and the union resulted from The News' own conduct over an extended period of time. Unlike *Alaska Roughnecks*, then, it cannot be said here that the alleged violation occurred "before [petitioners'] having either notice of [their] alleged status as employer, or any duty to bargain." *Ibid.* The notice and duty had long existed.[10]

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[9] Cf. *Sun-Maid Growers of California* v. *NLRB*, 618 F.2d at 59 (a later Ninth Circuit decision distinguishing *Alaska Roughnecks*).

We stressed the "rather unusual facts" of *Alaska Roughnecks* in our memorandum to this Court in that case; because the case was tied to those facts, we did not petition for certiorari. Memorandum for the NLRB at 4, *Alaska Roughnecks & Drillers Ass'n* v. *NLRB*, *supra*.

[10] Petitioners' reliance on *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), is misplaced. This Court held only that an employer cannot be found to have refused to bargain when its employees' representative did not make a request to bargain. *Id.* at 297-298. Here the NMDU made clear its objections to the changes in the operation of the mailroom and, on the facts of this case, was actually bar-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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gaining about them with The News, through T&T (Pet. App. 90a-94a). Petitioners' citation (Pet. 8) to *NLRB* v. *Island Typographers, Inc.*, 705 F.2d 44 (2d Cir. 1983), is inapposite for the same reason.

Petitioners also assert (Pet. 10-11) that the NMDU should have sought to formalize The News' status earlier, but it is irrelevant that the NMDU did not complain about its employer's actions until it had reason to. And, as discussed (pages 13, note 8, *supra*,) the NMDU may not always have been aware of the relationship between The News and T&T.

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